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| TRANSMITTAL SLIP | DATE 13 June 1985 |
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| TO: DDA | |
| ROOM NO. | BUILDING |
| REMARKS: | |
| FROM: LEG/OLL | |
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FORM NO. 1 FEB 56 241 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

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12 June 1985

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MEMORANDUM FOR: Deputy Director for Administration
General Counsel
Chairman, Security Committee
Director, Office of Personnel
Director, Office of Security
Chief, Administrative Law Division, OGC
Chief, Intelligence Community Affairs
Division, OGC
Chairman, Publications Review Board

FROM: [redacted] STAT
Legislation Division
Office of Legislative Liaison

SUBJECT: Draft DoJ and GSA Views Letters on H.R. 39
"Federal Polygraph Limitation and Anti-
Censorship Act of 1984"

1. Attached please find copies of two draft views letters on H.R. 39, the "Federal Polygraph Limitation and Anti-Censorship Act of 1984": one from the Office of Personnel Management and the other from the Department of Defense.

2. Both have been sent to this office for comment by the Office of Management and Budget prior to their transmission to the Congress. I would appreciate receiving your comments on the letters by Friday, 14 June 1985.

[redacted] STAT

Attachments
as stated

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United States
**Office of Personnel Management**
Washington, D.C. 20415

In Reply Refer To

Your Reference

E -

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for comments from the Office of Personnel Management on H.R. 39, the "Federal Polygraph Limitation and Anti-Censorship Act of 1984." H.R. 39 would amend Chapter 73 of Title 5 of the United States Code.

OPM has government-wide responsibility for the civilian personnel security and suitability programs. Although OPM does not itself administer polygraph examinations, or require pre-publication review, nevertheless, it is charged with investigating individuals who are to have access to classified information, and with consideration of agency requests for use of the polygraph in screening applicants for apointments in the competitive service.

The use of the polygraph exams in the federal government, and its implications on the privacy and rights of employees is not a novel issue. In 1965 President Johnson directed a comprehensive review of the use of polygraph in the Executive branch, and issued a memorandum which has since been incorporated into the Federal Personnel Manual. The memorandum imposed certain restrictions on the use of the polygraph, while, at the same time, authorizing its usage in criminal and (counter) intelligence-related operations.

Unlike H.R. 39, President Johnson's memorandum recognized that agencies other than the Central Intelligence Agency and the National Security Agency had "intelligence or counter-intelligence missions directly affecting the national security." Further, unlike H.R. 39, President Johnson's memorandum recognized that certain agencies or agency components with missions similar to that of the CIA or NSA, require use of polygraph examinations for supplementary employment screening. Adequate procedural safeguards were included, and the Civil Service Commission was granted authority to prevent abuse of polygraph procedures in screening appointments in the competitive service.

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OPM, and the Civil Service Commission before it, have used that authority prudently. Although, in certain respects, President Johnson's memorandum allowed agencies a greater measure of discretion than provided either in President Reagan's National Security Decision Directive No. 84 or H.R. 39, there has not been a single complaint (filed with or brought to the attention of OPM or the Civil Service Commission) of abuse and misidentification. In the course of the last 19 years, OPM has granted approval to only 3 agencies for polygraph examinations. This approval was granted only after proper evidence that the requisite level of examining expertise existed in the agency, assurances of adequate protections against abuse or error, and guarantees of comprehensive due process protections for applicants and employees.

No evidence has been offered to demonstrate that existing employee protections are inadequate, or that agencies would fail to develop adequate safeguards against potential abuse. The enactment of the proposed bill would protect against "abuses" that do not exist, and would refute the overwhelming evidence demonstrated by scientific studies, government surveys, and "real life" experience of the extraordinary effectiveness of polygraph testing as a screening and investigative tool, when these are restricted to situations where they are warranted.

OPM is opposed to H.R. 39 because it fails to strike a responsible balance between the rights, privacy, and protection of Federal employees, and the safety and security of the nation's most sensitive secrets.

The Office of Management and Budget has advised this Agency that there is no objection to the submission of this report from the standpoint of the Administration's programs.

Sincerely,

Loretta Cornelius
Acting Director

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON D.C 20301

Honorable William D. Ford
Chairman, Committee on Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request for the views of the Department of Defense on H.R. 39, 99th Congress, a bill "Relating to the administration of polygraph examinations and prepublication review requirements by Federal agencies."

The proposed legislation poses serious concerns for the Department of Defense. Specifically, the polygraph is currently used in the Department of Defense for several purposes not recognized by the draft bill: first to resolve derogatory information developed in a background investigation that cannot be resolved in any other way; second to ensure that intelligence sources are bona fide; third, for exculpatory purposes; and fourth, for investigation of unauthorized disclosures of classified information.

Moreover, the bill would preclude any future use of the polygraph, regardless of how limited, as a means of assessing Department of Defense personnel for access to highly sensitive classified information. In this regard, the bill would contravene the authority granted by Congress to the Department of Defense in Sec. 1016 of the Fiscal Year 1985 Defense Authorization Act, for the conduct of a test of the Department's proposal for use of the polygraph in this area.

Changes necessary to resolve problems identified in H.R. 39 are as follows:

Amend §7362 (b) to read as follows:

"(b) An Executive agency or military department may request in writing that a person occupying, applying for, or under consideration for a position in the civil service or the uniformed services consent to a polygraph examination, and may administer or arrange for administration of such examination upon receipt of that person's written consent, if-

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(1) the examination is to be administered as part of an investigation into alleged criminal conduct constituting an offense punishable by death or imprisonment for a term exceeding one year or into an unauthorized disclosure of classified information.

(2) means of investigation other than polygraph examination have been exhausted to the degree reasonable in the circumstances;

(3) the person can reasonably be expected to have knowledge of importance to the investigation; and

(4) the scope of the examination is limited to the subject matter of the investigation."

Insert the following new §§7363 and 7364:

"§7363 Department of Defense Intelligence and Special Access Program Use of the Polygraph

(a) Notwithstanding section 7362 of this title, the Secretary of Defense may issue regulations establishing a pilot program utilizing a limited polygraph examination as a condition of access with respect to categories of persons described in (1), (2), and (3) of this section provided that the program shall be limited to two years and shall not entail more than 3,500 polygraph examinations being administered in the first year of the test program:

(1) persons occupying, applying for, or under consideration for a position in the civil service or the uniformed services, if such individual has, or will have, access to specifically designated classified information within special access programs created pursuant to section 4.2(a) of Executive Order 12356;

(2) DoD civilian, military and contractor personnel in positions designated by the Director, Defense Intelligence Agency, as critical intelligence positions; and

(3) persons whose services immediately require access to Sensitive Compartmented Information where operational exigencies have been determined by the head of a DoD department or agency to preclude completion of the required background investigation before the interim access is necessary.

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(b) No polygraph examinations may be administered pursuant to this section unless and until the Secretary of Defense, issues regulations requiring that;

(1) to the extent practicable, those being considered for employment in or assignment to duties which will require access to information for which a limited polygraph examination permitted by this section is a condition of access shall be advised of such requirement prior to their assignment to, or selection for, such duties;

(2) any current employee, detailee, or assignee whose duties require access to information for which a limited polygraph examination permitted by this section is established as a condition of access, who refuses to take such examination, may be denied access to such information, but shall be retained by the employing component, at the same pay and grade, or if not practicable, at the same pay and grade in a position elsewhere in the department or agency;

(3) any polygraph examinations administered pursuant to this section is limited to questions designed to ascertain whether the subject of the examination has committed, is commmitting or is about to commit espionage or sabotage against the United States, or intentional compromise of classified information; and

(4) access to classified information shall not be denied solely on the basis of the results of an analysis of polygraph charts, unless such denial is personally approved by the head of the department or agency, in specific cases, where the information to which access sought is of such extraordinary sensitivity that access under the circumstances poses an unacceptable risk to the national security.

(c) No later than February 1, 1987, the Secretary of Defense shall transmit to the Congress a report on the use of polygraph examinations administered pursuant to this section. The report shall include the number of polygraph examinations conducted, a description of the purposes and results of such examinations, an explanation of the uses made of the results of the examinations, and description of those cases in which more than two examinations were needed to attempt to dispell discrepancies.

§7364 Foreign Nationals, Intelligence Agents, Exculpation and Other Limited Uses

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Section 7362 of this bill does not apply to the Department of Defense in the case of polygraph examinations administered for the purpose of-

(a) assisting in determining the initial eligibility of foreign nationals for access to classified information and periodically thereafter to ensure that continued access to classified information is clearly consistent with the national security.

(b) determining the suitability, reliability, or credibility of personnel who are used as, proposed for use as, or who purport to be, agents, sources, or operatives in foreign intelligence or counterintelligence activities;

(c) responding to the request of the subject of a criminal, counterintelligence or personnel security investigation for a polygraph examination, as a means of exculpation, with respect to allegations or conduct arising in the course of such investigations; and

(d) resolving serious credible derogatory information, with the consent of the examinee, developed in connection with a personnel security investigation of a DoD civilian, military or contractor employee, that cannot be resolved in any other manner."

Renumber present §§7363 and 7364 as §§ 7365 and 7366.

Renumber §7365 as §7367 and amend to read as follows:

"Sections 7362 and 7365 of this title do not apply."

Amend present §7365(2) to read as follows:

"(2) to the National Security Agency, in the case of an individual employed by, assigned to, or detailed to, the National Security Agency, any expert or consultant under a contract with the National Security Agency, any employee of a contractor of the National Security Agency, or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored; or in the case of any individual applying for a position in the National Security Agency."

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The Office of Management and Budget advises that, from the standpoint of the Administration's program there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

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